United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

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United States Court of Appeals

For the Second Circuit

CHRIS-CRAFT INDUSTRIES, INC.,
Plaintiff-Appellant-Cross-Appellee,

against

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, DAVID W. WALLACE and THE FIRST BOSTON CORPORATION,
Defendants-Appellees-Cross-Appellants.

Appeal from a Judgment of the United States District Court for the Southern District of New York

REPLY AND ANSWERING BRIEF OF PLAINTIFF-APPELLANT-CROSS-APPELLEE CHRIS-CRAFT INDUSTRIES, INC.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for Plaintiff-Appellant-Cross-Appellee
Chris-Craft Industries, Inc.
345 Park Avenue
New York, New York 10022
(212) 644-8000

ARTHUR L. LIMAN
STUART ROBINOWITZ
JACK C. AUSPITZ
ANTHONY M. RADICE
RICHARD A. MILLER
Of Counsel

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Preliminary Statement

Defendants' answering brief is a strange document because it does not attempt to respond to CC's principal brief. It is an answering brief that does not answer.

It does not attempt to explain away or justify the legal errors permeating the District Court's opinion* or to distinguish the controlling precedents cited in CC's principal brief and the SEC's *amicus* brief.

Instead of facing these legal issues, defendants seek to confuse the appeal by pretending that there are complex factual issues requiring application of the "clearly erroneous" rule. By preempting most of their brief with distorted recitations of the record and lengthy quotations from the opinion below, defendants try to avoid the legal issues that controlled the result below.

The reason for this strategy is simple—no one, as the SEC points out, can really defend the legal premises underlying the District Court's opinion and its continuing disagreement with the two prior opinions of this Court. So defendants do not even try. Instead, they hope that faced with a third appeal, and an array of expert opinions, this Court will finally throw up its hands.

The premises underlying defendants' arguments remain the same as on the prior appeals: BP would have won control of Piper even if defendants had not violated the securities laws (although the 14% contraband blocks happened to spell the difference between defeat and victory); this Court, the SEC and CC are all mistaken in believing that CC suffered any injury by being catapulted from a leading position in the control contest to an illiquid minority position subject to merger at any time; the District Court was "generous" in awarding CC any damages; indeed,

* The District Court's opinion is reported at 384 F. Supp. 507 (S.D.N.Y. 1974).

this Court should reverse its findings on liability, or alternatively, upset the damage award as a penalty.

Thus, repeated and massive securities violations are lightly brushed aside. And BP's $13 million windfall from the District Court's decision is not even mentioned!

Defendants' reasoning is no better than their cross-appeal urging this Court to repudiate its prior decisions. For defendants' arguments on damages are only a rehash of their claim that CC failed to prove with certainty that in a fair contest it would have acquired the shares that gave BP its unlawful victory. This Court rejected this specious claim. In keeping with the rationale of *Mills* and *Ute,** this Court recognized that whatever market risks CC took that it might lose a lawful contest, it did not assume the risk that it would be defeated by defendants' repeated violations of the law. Having defied the securities laws to win, defendants must, under this Court's decision and the controlling authorities, compensate CC for its injury.

POINT I

THIS APPEAL INVOLVES ISSUES OF LAW AND NOT DISPUTED ISSUES OF FACT.

Defendants play with semantics when they argue that CC failed to prove its damages (Def. Br. pp. 7-8). What they mean is that CC's experts refused to accept defendants' zero damage hypothesis. By trying to hide the District Court's opinion behind a wall of alleged credibility

* *Mills* v. *Electric Auto Lite Co.*, 396 U.S. 375 (1970); *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128 (1972).

problems, the defendants reverse the normal rule that the measure of damages is an issue of law on which the trial court must defer to the Court of Appeals.* *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128, 154-56 (1972); *Polaroid Corp.* v. *Shuster's Express, Inc.,* 484 F.2d 349, 350-51 (1st Cir. 1973); *City of Boulder* v. *Snyder,* 396 F.2d 853, 856 (10th Cir. 1968), *cert. denied,* 393 U.S. 1051 (1969); *United States* v. *Carson,* 372 F.2d 429, 431 (6th Cir. 1967).

Defendants' wrangling over the details of the record cannot obscure the point that the trial court's "strict literal interpretation" reads compensatory damages out of this Court's mandate and that all of the material facts necessary for the correct computation of damages are undisputed. Thus, defendants do not contest:

1. CC paid an average price of $64 a share—almost all in cash—in seeking control of Piper.

2. BP, entering the contest four months after CC when the price of Piper was higher, paid an average of $80 a share. To this date, BP has never contended that it overpaid for control of Piper.

3. Once BP unlawfully gained majority control of Piper, CC's minority block could be sold only by a public offering, which required the cooperation of BP as well as audited financial statements.

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* Defendants' brief is replete with factual errors and distortions. Since this appeal concerns errors of law and conflicting theories of damage, these misstatements are largely irrelevant. Nonetheless, for the convenience of the Court, we have pointed out the principal ones in the addendum to the brief.

4. No registration statement was ever available to CC. Piper's audited financials—a prerequisite of registration—were not certified until May of 1970. By that time market conditions precluded a public offering. Defendants offered no proof that the audit could have been accelerated, or that they would have given the cooperation necessary to prepare a registration statement. The evidence on this subject—all offered by CC—was totally to the contrary.

5. In securing majority control BP also acquired—and so acknowledged in its SEC filings—the power to compel a merger at any time, a power so drastic that defendants, in their brief, analogize it to the power to "confiscate" the holdings of the minority (Def. Br. p. 5).

6. CC has incurred almost $14 million in interest costs over the past five years to sustain its illiquid Piper holdings.

7. At the end of the five-year injunctive period, BP will be free to use its illegally acquired power to compel a merger. The terms of the merger will depend on the conditions prevailing at that time. Both the market price and earnings of Piper have declined since 1969. Its stock is now selling at $10 to $12 a share.

CC's experts took all of these facts into account. Defendants' experts ignored them. Instead, their testimony rested on fictions carefully tailored to produce the conclusion of no damages—that CC's illiquid 700,000-share block was equivalent to a mere 100 shares; that a merger had been consummated on September 5, 1969, pursuant to a

plan announced on January 22, 1969; that audited financials had been produced overnight, and a registration statement had been prepared, processed, and rendered effective instantaneously on September 5.

The parties thus clashed below, not over the facts, but over legal theory. If the defendants' interpretation of the measure of damages was in error, the testimony of their experts based on that interpretation was as incompetent as it was irrelevant. Conversely, if defendants' interpretation was correct, then zero damages are a foregone conclusion, and CC's experts' testimony was beside the point.

The District Court opted essentially for defendants' theory, valuing CC's block as a 100-share unit, without regard to BP's power to compel a merger at any time, or to the prices paid by CC and BP, or to the illiquidity of CC's minority holdings. This was not a matter of "confidence in the judgment of experts," as defendants argue (Def. Br. p. 31) but of the appropriate measure of damages —an issue of law. If this Court has the power, as defendants concede, to delineate the guidelines for the damages, *a fortiori,* it has the power to review the District Court's interpretation of those guidelines. Defendants cannot shield the decision below from review by invoking the clearly erroneous rule.

POINT II

THIS COURT SHOULD AWARD COMPENSATORY DAMAGES BY APPLYING ESTABLISHED PRINCIPLES TO UNDISPUTED FACTS.

The defendants' argument that the District Court scrupulously applied this Court's mandate to measure the "reduction in appraisal value" is an *ipse dixit.* What they mean is that the District Court adopted an interpretation that approaches their own zero damage theory. Their brief is noteworthy for its frequent repetition of "appraisal value"—a concept which the District Court professed "perplexity in grasping"—without any explanation of what defendants claim it means. Indeed, the only meaning their brief attributes to the phrase is that it is the three distinct and inconsistent values that defendants' experts testified to on their zero damage theories.*

Defendants also deny that the District Court opted for "a strict literal interpretation" of this Court's opinion, rather than follow its "broad remedial intent" (Def. Br. p. 31). But the District Court specifically said it was doing just that. The SEC agrees with CC that the District Court defied this Court's intent. For example, the SEC states:

> "The Commission believes that the judgment of the District Court frustrates both the prior decisions of this Court in the instant case and the policies of investor protection and fair dealing embodied in the federal securities laws." SEC Mem. p. 2.

* * *

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* Fitzgerald calculated intrinsic value; Lank the price that would be awarded by a statutory appraisal court in a September 5 merger pursuant to a January 22 plan; and Gant a September 5 public offering price pursuant to an instantaneous registration statement and audited financials (CC Br. pp. 14-20).

"[T]he calculation of damages is internally inconsistent and avoids the impact of this Court's decision—with which the District Court apparently disagrees." SEC Mem. p. 4.

The remedial intent of this Court's mandate was to give CC no less than compensatory damages, determined in accordance with the established d[illegible] principles in securities cases. As the SEC poi[illegible] principles require that CC "should at the ver[illegible]ceive the difference between its cost (averaging $64 p[illegible] share) and the value of its holdings at such time after Bangor Punta acquired control of Piper as Chris-Craft could have disposed of its holdings" (SEC Mem. p. 11, n. 13). This Court, which held that damages should be "didactic" and "bitter medicine," did not intend to abolish these damage standards. Yet the District Court disregarded them:

—First, it speculated that each of CC's Piper shares had a mythical "fair market value" of $48 and a mythical control premium of $2.40 (a total value of $50.40). The $50.40 figure was far below the amounts CC paid for its stock ($64), the estimated value of its lead position ($72), or BP's own evaluation of control ($80).

—Second, the District Court, as the SEC points out, did not finish the damage calculation by determining the amount that CC could have obtained for its stock *after* BP illegally seized control.

We turn to the established damage standards which the defendants, like the District Court, ignore.

Value of CC's Block Prior to BP's Illegal Seizure of Control

1. In calculating damages in an action under the securities laws, the starting point is the cost of the plaintiff's shares. *Levine* v. *Seilon, Inc.*, 439 F.2d 328, 334 (2d Cir. 1971); *Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167 (2d Cir. 1970); *Janigan* v. *Taylor*, 344 F.2d 781 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965).* The District Court rejected this principle. It ignored CC's average cost ($64) and instead created a hypothetical "fair market" value ($48) which was well below Piper's market price even before the control contest started. This was clear legal error and defendants do not attempt to justify this departure from precedent.

2. Where the actual value of a party's stock exceeds his cost, he must be afforded the opportunity to recover the higher value. This Court clearly intended that this principle be followed below. As the SEC observes in its *amicus* brief, "using cost as a starting point might unfairly penalize Chris-Craft." The SEC explains:

> "Whereas the traditional measure is based upon an investor's cost, this Court apparently recognized that the injury for which Chris-Craft was to be compensated occurred subsequent to the times at which Chris-Craft acquired its interest and that using cost as a starting point might unfairly penalize Chris-Craft. The injury was to the value of its accumulated holdings—a value presumably in excess of its cost, since Chris-Craft's

* The rationale of this rule is that since the purchaser might not have made his investment in the absence of the securities violations, he should at the very least be made whole for his cost. As the SEC recognizes, this principle is compelling here, where CC clearly would not have entered the control contest if it had known that its rival could win by violating the law (SEC Mem. p. 11).

> earlier-acquired shares were purchased at a lower cost and the amount of premium attributable to its holdings would increase as it approached control." SEC Mem. pp. 11-12.

CC offered proof that its plurality block had a value of $72 a share. Defendants offered no counter-values since their theories, which assumed that CC was a sure loser, precluded a valuation of the plurality.

3. Where a wrongdoer places a value on the property it damages, the Court may not substitute a lower subjective value. That principle, articulated by Judge Cardozo in *Triangle Waist Co.* v. *Todd,* 223 N.Y. 27, 31 (1918), cited in CC's principal brief (p. 43), was recently applied in determining damages for a securities violation in *Pierre J. LeLandais & Co.* v. *MDS-Atron, Inc.*, CCH Fed. Sec. L. Rep. [Current] ¶94,930 at 97,227 (S.D.N.Y. Dec. 27, 1974).

The District Court rejected this principle. It ignored the $80 per share price which the defendants placed on the opportunity to control Piper. Defendants are silent about this departure from precedent as well.

In rejecting the prices that CC and BP paid for their shares, the District Court ignored not only the controlling legal principles, but, as the SEC observes, the commercial realities of the marketplace:

> "[I]t does not appear that the District Court arrived at a fair market value, since the actual market price was ignored. . . . The value arrived at by the District Court necessarily assumed that reasonable businessmen would engage in a contest in which they would offer to pay 50% or 75% more than the value of what

they would acquire. Such an assumption appears unreasonable on the facts of this case." SEC Mem. p. 13, n. 15.

The defendants argue that the existence of BP's large block all but eliminates damages in this case.* The inescapable conclusion of this logic is that whenever a control contest is close, a contestant may violate the law with impunity because he will be able to disaffirm the prices he paid for control by pointing to the existence of his own block as proof of no damages. The facts here further demonstrate the fallacy of the argument: CC paid an average of $64 per share for its holdings in the face of the Piper family block and then the BP block; and BP paid up to $80 per share in the face of CC's large block. Under this Court's mandate and the established principles of damages discussed above, the prices measure the value of CC's plurality holdings.

Value of CC's Block After BP's Illegal Seizure of Control

The damage principles that determine the value of CC's minority block are also well-established:

1. Under *Chasins* and its progeny, the plaintiff's loss is measured by the price that was or could have been realized on resale. This permits the victim to be made whole for the cost of an investment that he might not have made if he had been forewarned of a defendant's violations. The SEC sums up the principle when it states that CC's loss should be measured by "the value of its holdings at such time after Bangor Punta acquired control of Piper as Chris-Craft could have disposed of its holdings" (SEC Mem. p. 11, n. 13).

* Defendants do not even attempt to support the District Court's speculation that CC's intention was to sell control.

The District Court never reached this vital step in calculating damages. Instead of determining the amount, if any, which CC could have realized for a 700,000 share block, the District Court computed the abstract value of an anonymous 100-share lot. This was clear legal error under standard damage principles and under this Court's decision, which recognized the "reduction" in the value of CC's $44 million investment when CC became "encumbered" with a large minority position.

Defendants remain discreetly silent about this error.

2. Defendants, like the District Court, also ignore the unbroken line of cases cited in CC's brief which hold that large minority blocks must be discounted for their illiquidity. *Kaufman* v. *Diversified Industries, Inc.*, 460 F.2d 1331 (2d Cir.), *cert. denied,* 409 U.S. 1038 (1972) (CC Br. pp. 37-39). Their assertion that discounts for blockage do not apply to public companies is false (Def. Br. p. 30, n.). *Helvering* v. *Maytag,* 125 F.2d 55 (8th Cir.), *cert. denied,* 316 U.S. 689 (1942), where the discount was 30%, involved a New York Stock Exchange-listed company with a float far greater than Piper's.

3. This Court recognized that the value of CC's holdings was diminished not only by the inherent illiquidity of the block, but by BP's "taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time" (480 F.2d at 380). But, as shown in our principal brief, the District Court rejected this rationale, stating that this Court was "wrong" and "erroneous" in assuming that BP had the power to merge. Defendants do not defend the District Court on this point for understandable reasons. BP has always acknowledged

that it had the power to merge (EV 31, 1467-68, 1471, 1481-82; 326A, 1883A).

4. The District Court also concluded that any injury to CC from BP's power to compel a merger at the time of its own choosing was "too speculative to quantify" (2342A). But the very uncertainty surrounding the timing and terms of a merger is what placed such an ominous cloud over CC's block and added to its illiquidity. Under *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), which the defendants do not discuss, this uncertainty cannot be resolved against CC (CC Br. pp. 48-50).

Defendants' only response is that "no state court will allow a majority shareholder to use the judicial process to take advantage of the minority" (Def. Br. p. 36). This is empty rhetoric. This Court singled out BP's power to merge as a key item of damage. Defendants' expert Lank just proved the point in a report he issued as a court-appointed appraiser in the Glen Alden-Schenley merger. Lank based his award on the conditions prevailing at the time of merger, not at the time when the majority took control. *Gibbons* v. *Schenley Industries, Inc.*, Civ. No. 3746 (Del. Ch., New Castle Co., July 18 & Sept. 17, 1974).* Defend-

* Lank admits that for purposes of statutory appraisal, the market price on the day before the merger is announced and the immediately preceding 5 years' earnings are rigidly used to determine the market and investment value components of fair value (EV 1219-20, 2774A). *See, e.g., In re Watt & Shand*, 304 A.2d 694 (Pa. 1973).

In addition to the commentaries cited in CC's main brief (p. 22), the inadequacy of the appraisal remedy was recently confirmed by two leading law professors:

> "In summary, our view is that the individual right of appraisal is not directly responsive to the problem of fiduciary abuse in mergers between parents and subsidiaries." Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 Harv. L. Rev. 297, 306 (1974).

ants and the District Court repeatedly stated that if CC had the power to merge, it could confiscate BP's investment. The power is no less confiscatory in the hands of BP, and defendants cannot excuse the District Court's legal error in failing to value CC's minority holdings subject to BP's power "to compel a merger at any time."

* * *

Since the District Court failed to determine the resale value of CC's minority holdings, this Court must. Application of the correct legal formula is within the power of this Court because all of the material facts are undisputed.

Experts on both sides agreed that CC's block could not have been sold except via a registered public offering.* In these circumstances, the shares must be valued under the *Chasins* principle as of the date a registered public offering was first available. This principle was recently recognized by the District Court in *Pierre J. LeLandais & Co.* v. *MDS-Atron, Inc.*, CCH Fed. Sec. L. Rep. [Current] ¶94,930 at 97,228 (S.D.N.Y. Dec. 27, 1974), where damages were computed after the date when the registration statement became available.

Here, no registration was ever effected; and CC's shares remained unsalable. The defendants, who had the burden of proof on mitigation,** offered no evidence that the nec-

* Murray and Rosenkranz believed that CC's block should and would not be sold by public offering because of the BP threat of merger (2579A, 2582A, 2645-46A). I. W. Burnham, head of Drexel, Burnham, was also unwilling to underwrite the shares (1149A, 3168-69A). Gant's firm would not have been willing to underwrite the shares unless BP gave some assurance about the exercise of its merger power (2862-63A)—an assurance which BP has never even suggested it was willing to give.

** *Hegler* v. *Board of Education*, 447 F.2d 1078, 1081 (8th Cir. 1971); *Roadway Express, Inc.* v. *Highway Truck Drivers & Helpers*, 299 F. Supp. 1058, 1063 (E.D. Pa. 1969); McCormick, *Damages* §33 at p. 130 (1935).

essary audited financials could have been produced before the market collapse in May, or that they would have cooperated in providing a registration statement.

In these circumstances, where no offering of CC's holdings could have been effectuated, the most appropriate relief would be to require BP to purchase CC's block at the higher of cost or market. Such relief is consistent with this Court's decision in *Gordon* v. *Burr,* CCH Fed. Sec. L. Rep. [Current] ¶94,874 (2d Cir. Nov. 20, 1974), holding that rescissionary relief is appropriate without privity. The defendants do not comment on the availability of this remedy which CC discussed in its main brief.

In the alternative, the value that CC could have realized on a registered public offering at the earliest realistic date may be used to measure the value of CC's minority block. Wahrsager's assumption—that if defendants and the auditors cooperated, an offering could have been effected in January 1970—is a more favorable hypothesis than the facts warrant. His $27 a share price for such an offering was not contradicted, and is an amount far in excess of Piper's present price.*

* The defendants' only evidence bearing on the actual value of CC's block on September 5 was offered by Gant. While he was of the view that CC's stock could be sold only by a public offering, he testified on cross that a private placement of CC's block on September 5 could possibly have been effected at a 25-30% discount from his market price of $44 to $46 a share provided that BP and Piper would have given a covenant to register their stock (2825-26A, 2831A). Again, defendants offered no evidence that such a commitment would have been forthcoming and thus the $31 to $34 a share price, yielded by his discount, was not available to CC and is more favorable to defendants than the record permits.

Summary

To recapitulate, the District Court did not apply the appropriate measure of damages. This Court should.

—The first step is to calculate the value of CC's stock before BP seized control, using as the test the higher of cost ($64) or actual value. Wahrsager's figure of $72 a share is conservative compared to the $80 value which the defendants are estopped from denying.

—The next step is to determine the price at which CC could have disposed of its block of stock after BP seized control. Since it is undisputed that a registration statement was not available, the appropriate remedy is to compel the defendants to purchase the shares at the higher of cost or market. Alternatively, the block must be valued at the undisputed January hypothetical public offering price of $27 a share—giving BP the benefit of any lower price at which it may ultimately be able to take CC's shares via a merger.

POINT III

DEFENDANTS USE FALSE PREMISES TO SUPPORT THE DISTRICT COURT'S INJUNCTION.

Defendants' support for the District Court's injunction rests entirely on the premise that the only purpose of the mandated injunction is to "give CCI a reasonable opportunity to select the time when it wished to liquidate its Piper investment" (Def. Br. p. 44). The very suggestion is cynical: CC, the victim, must sell now with the market price of Piper at $10-12 a share or be merged out by BP

five years from now when the leading forecasters predict a continued bad economy, particularly for petroleum dependent industries. This Court's mandate for injunctive relief was not intended to force the victim to such a Hobson's choice.

While the Court directed that CC's injury be remedied by damages, the injunction was intended for a distinct purpose—to deny a present violator of the securities laws the fruits of its illegal victory (480 F.2d at 380). If this purpose is to be served, then all incidents of control must be denied to BP, for they are the fruits of the violations. The SEC agrees "that the form of injunctive relief proposed by Chris-Craft would constitute a particularly effective deterrent to securities laws violations in connection with contests for corporate control" (SEC Mem. p. 8), and would thus fulfill the "didactic effect" intended by this Court.

Defendants raise a straw man in asserting that CC has changed its position, and is seeking to reopen the control contest. CC's request for rescissionary relief—that defendants buy its Piper shares—hardly comes from a party bent on reopening the control contest. And CC has renounced the right during the injunctive period to compel a merger between Piper and CC—the most meaningful incident of majority control (CC Br. p. 62).

Defendants' suggestion that the District Court's injunction returns the parties to the *status quo ante* (Def. Br. p. 46) is a sham. The decree perpetuates an illegal *status quo* which existed after BP seized control by violating the securities law—not the *status quo* in a fair race with CC enjoying a 41-31% "formidable" lead. The record refutes

any claim that BP and CC were partners in control of Piper;* and the SEC correctly observes that, contrary to this Court's intentions in directing the injunction, the District Court has "perpetuate[d] Bangor Punta's dominance over Piper" (SEC Mem. p. 5).

Finally, defendants' arguments wholly ignore the interests of Piper and its public shareholders which cannot be served by: (1) a stalemated Board; (2) a BP veto over all corporate action; and (3) the preservation of BP's selected management.

BP is more than willing for Piper to endure a period of stagnation to ensure that after the injunction period it obtains absolute control. If rescissionary relief is not granted, CC's only interest is the improvement of Piper's earnings in an effort to maximize the price obtainable by CC and the public shareholders in a merger. The District Court's injunction not only fails to deny BP the fruits of its illegal victory but preserves them for the day when BP can merge Piper into itself with impunity.

The SEC's Alternative Proposal

While the SEC endorses CC's proposed injunction as a "particularly effective deterrent to securities laws violations," it suggests, as an alternative, a "voting trust."

Under the voting trust arrangement, both CC and BP would seek to buy enough public shares to gain majority control during the injunction period, but CC faces a unique

* The minutes cited by defendants (Def. Br. p. 48) refer to Piper's former president, a BP employee, who was appointed over CC's objection. Other officers were designated over CC's objections (CC Br. p. 11, n.), as were Piper's auditors (EV 1356). The "regency" that defendants and the District Court speak of is just that: BP is the regent and CC the ward.

risk because of BP's previous illegal acquisition of control. If CC buys shares and falls short of majority control, BP can merge CC out after the five years and confiscate the new shares as well as the old. BP faces no such risk of throwing good money after bad, for regardless of the result of this mini-contest, after five years BP returns to majority control.

CC could have only one way out of this dilemma. If it buys enough shares to acquire interim majority control, the SEC's proposal would compel CC to merge with Piper to prevent the loss of its new and old investment. This compulsion for a CC-Piper merger cannot be in the interest of the public shareholders.

The rescissionary relief requested by CC would resolve this dilemma: CC will have disposed of its Piper investment; BP will have paid for the control it illegally obtained; and Piper will not be subject to corporate paralysis.

POINT IV

DEFENDANTS' CROSS-APPEAL IS A SHAM.

The Doctrine of Law of the Case Precludes Defendants from Raising Issues of Law That This Court Conclusively and Correctly Determined in the Prior Decision

Defendants contend on their cross-appeal that they are entitled to raise again all the issues determined against them in the prior appeal. Having litigated and lost (not just once, but on two prior appeals), with rehearing *en banc* and certiorari denied, they would like a third bite at

the same apple. This Court's prior decision, however, is not only settled law in this case, but also a leading precedent in this and other circuits.

The law of the case doctrine bars a litigant from urging reconsideration of a previously decided issue, except in certain narrowly-defined and extraordinary situations. The doctrine advances the judicial policies of preventing endless litigation, equitably employing the resources of appellate courts, deterring panel-shopping and preserving the stability of precedents in a multi-panel Court. *See, e.g., Roberts* v. *Cooper,* 61 U.S. (20 How.) 467, 481 (1857); *Perrone* v. *Pennsylvania R. Co.,* 143 F.2d 168, 169 (2d Cir. 1944); *Hatch* v. *Morosco Holding Co.,* 26 F.2d 247 (2d Cir. 1928), *aff'd sub nom., Riehle* v. *Margolies,* 279 U.S. 218 (1929).

The defendants urge this Court to reconsider its prior holdings on *scienter,* standing under §14(e) and causation on the ground "of intervening decisions and developments" (Def. Br. p. 60). But defendants offer no conflicting authorities. *Lanza* v. *Drexel & Co.,* 479 F.2d 1277, 1306, n. 98 (2d Cir. 1973), which they cite as an intervening and allegedly conflicting decision, is not in conflict with this Court's decision in *Chris-Craft.* In fact, the *Lanza* court cited the *Chris-Craft* decision with approval, not disagreement. Defendants claim that this Court's prior holding on *scienter* makes "simple negligence a basis for liability" (Def. Br. p. 61). This is an outrageous mischaracterization that is refuted by the Court's own opinion. In *Chris-Craft,* as well as *Lanza,* this Court held that *scienter* was required and

that simple negligence was not sufficient. 480 F.2d at 363; 479 F.2d at 1306.*

This Court's prior decision in this case is not only good law in this Court but has become a landmark case in the enforcement of the securities laws. It has become settled precedent in this and other circuits,** and has been followed and approved by courts and commentators too numerous to mention. The irony of defendants' cross-appeal is that the only Circuit Court criticism of the *Chris-Craft* decision is this Court's failure to use a less rigorous *scienter* requirement. *See White* v. *Abrams,* 495 F.2d 724 (9th Cir. 1974). Defendants present no grounds for bypassing the law of the case doctrine or for altering any of this Court's prior holdings.

Defendants' Claim That the Damages Were Punitive Is Untenable

Defendants' contention that any award of damages is punitive is nothing more than a restatement of their discredited causation theories and their zero damage interpretation of the Court's mandate.

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* Defendants' use of *Clegg* v. *Conk,* CCH Fed. Sec. L. Rep. [Current] ¶94,897 (10th Cir. Dec. 5, 1974), to show a difference between *Lanza* and *Chris-Craft* is absurd. The *Clegg* court mentioned "some prior [Second Circuit] opinions" imposing liability for mere negligence, but does not even cite *Chris-Craft.*

** *See, e.g., Flaks* v. *Koegel,* 504 F.2d 702 (2d Cir. 1974) (rescission); *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith,* 495 F.2d 228 (2d Cir. 1974); *Herbst* v. *I.T.T.,* 495 F.2d 1308 (2d Cir. 1974) (reliance); *Smallwood* v. *Pearl Brewery Co.,* 489 F.2d 579, 604-05 (5th Cir.), *cert. denied,* 43 U.S.L.W. 3212 (U.S. Oct. 15, 1974); *Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247, 251 (2d Cir. 1973); *Republic Technology Fund, Inc.* v. *Lionel Corp.,* 483 F.2d 540, 551 (2d Cir.), *cert. denied,* 415 U.S. 918 (1973) (materiality); *H. K. Porter Co.* v. *Nicholson File Co.,* 482 F.2d 421 (1st Cir. 1973) (standing).

The argument that the award of damages is a particular penalty to the Piper defendants, whose culpability is unquestioned, is based on distortions of this Court's majority decision:

"[T]hese misleading statements [the January shareholder letters and the Grumman press release] most likely had a continuing adverse effect on CCI's attempt to acquire Piper shares. . . .

"We hold that, considering the narrow margin of victory here, the Piper family's misstatements and omissions in the January shareholder letters and the Grumman press release denied to CCI a fair opportunity to win the contest for control.

* * *

"We hold that the record establishes that the injuries sustained by CCI were caused by the violations of the securities laws by BPC and its named officers, First Boston and its named officers, and members of the Piper family." 480 F.2d at 377.

Accordingly, this Court directed that judgment be entered assessing damages against all defendants jointly and severally, because "the conduct of each of the defendants through their violations of the securities laws, contributed to the success of BPC's takeover attempt. . . ." (480 F.2d at 380).

The Defendants' Arguments Regarding Interest Are Without Merit

Defendants also challenge CC's right to recover either the carrying charges of its Piper investment or pre-judgment interest. CC's actual out-of-pocket loss includes the

$14,000,000 in interest charges which it has paid out on its frozen Piper investment.* The SEC recognizes that this is a compensable element of CC's damages (SEC Mem. p. 16, n. 19). And the cases further support CC's claim. *See, e.g., Zeller* v. *Bogue Electric Mfg. Corp.*, 476 F.2d 795 (2d Cir.), *cert. denied*, 414 U.S. 908 (1973).

The defendants not only oppose the award of the carrying charges, but go so far as to call the statutory interest awarded by the District Court a "penalty." It is not—except to CC which received only $600,000 in interest in lieu of the $14,000,000 it expended. Contrary to defendants' claim, CC is not seeking "interest on interest" (Def. Br. p. 6, n.). To the extent that the actual carrying charges are awarded, CC does not seek statutory interest on its lost investment.

The defendants' claim that pre-judgment interest is not permissible, or that it should be at the rate of 6% for the entire period, is wrong:

(1) In securities cases, pre-judgment interest is awarded in order to strike a fair balance between the parties and is not limited " 'to a rigid theory of compensation for money withheld,' " as defendants assert. *Blau* v. *Lehman*, 368 U.S. 403, 414 (1962), *citing Board of Commissioners* v. *United States*, 308 U.S. 343, 352 (1939). Since defendants' frauds caused CC to incur at least $14 million in interest expenses, the balance of equities clearly requires the award of interest.

* Defendants do not dispute the fact that CC incurred the expense nor the accuracy of this figure.

(2) The District Court chose to award CC pre-judgment interest at the rate a New York court would apply. The Court was at liberty to apply an even higher rate which was related to the cost of money in the market place.* Defendants assert, however, that the Court erred in applying New York law and that New York's 1973 reduction of the legal rate from 7½% to 6% applies retroactively (Def. Br. pp. 58-59). But as is demonstrated by decisions that considered precisely this question, the change in New York law had only prospective effect and the 7½% interest rate applies for the 1969 through 1972 period. *Kaufman* v. *Chase Manhattan Bank*, 370 F. Supp. 279, 281 (S.D.N.Y. 1974); *Pan American World Airways, Inc.* v. *Aetna Casualty & Surety Co.*, 368 F.Supp. 1098, 1142 (S.D.N.Y. 1973); *7 Doyer St. Realty Corp.* v. *Great Cathay Development Corp.*, 43 App. Div. 2d 476, 352 N.Y.S. 2d 483 (1st Dep't 1974). Thus, insofar as the District Court decided to apply New York law, its interpretation of the interest rate was correct.**

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* *Johns Hopkins University* v. *Hutton*, 297 F.Supp. 1165, 1229 (D. Md. 1968), *modified and remanded*, 422 F.2d 1124 (4th Cir. 1970); *Austrian* v. *Williams*, 103 F. Supp. 64, 118 (S.D.N.Y.), *rev'd on other grounds*, 198 F.2d 697 (2d Cir.), *cert. denied*, 344 U.S. 909 (1952). *Johns Hopkins* is also controlling precedent for awarding prejudgment interest on a judgment mandating rescission. CC would be entitled to such interest should the Court order the suggested rescissionary relief.

** Defendants' discussion of attorneys' fees adds nothing to the discussion of the point in CC's brief. If such fees are ever allowable in a private securities case—an open question according to this Court in *Crane Co.* v. *American Standard, Inc.*—we submit that this is the case. 490 F.2d 332 (2d Cir. 1974). The SEC's *amicus* briefs on each of the three appeals attest to the public interest served by CC's action.

Conclusion

For the reasons sets forth above and in CC's principal brief, this Court should reverse the decision below and grant the relief prayed for herein. The cross-appeal should be dismissed.

Dated: February 14, 1975

Respectfully submitted,

Paul, Weiss, Rifkind, Wharton & Garrison
Attorneys for Plaintiff-Appellant-Cross-Appellee
Chris-Craft Industries, Inc.
345 Park Avenue
New York, New York 10022
(212) 644-8000

Arthur L. Liman
Stuart Robinowitz
Jack C. Auspitz
Anthony M. Radice
Richard A. Miller
Of Counsel

ADDENDUM

I. Defendants' Brief

The following are some of the errors and distortions in defendants' brief:

Defendants' Brief	*The Record*
(1) Wahrsager said that CC's Piper shares could have been sold in a public offering on September 5 at $50 (Def. Br. pp. 13, 14, 15, 51).	Absolutely untrue. Wahrsager testified that CC's Piper stock was "inherently unmarketable" on September 5 (2435-36A, EV 833, 835). Wahrsager rejected the assumptions of overnight financials and instant offerings upon which any September 5 offering must be based. Moreover, $50 was the 100-share value and not the price at which 700,000 shares could be sold on September 5 or any other date (2484-85A).
(2) Gant "authoritatively" testified to the premium, over fair market value, of a controlling block of Piper (Def. Br. p. 39).	"Q. Did you make an effort to quantify in terms of the Piper situation what 51 per cent was worth versus 41 per cent? A. No, I did not" (2924A). * * * "What they would pay to have a 51 per cent position where you have an opponent holding 42 percent . . . . I really don't know how to go about appraising it . . . ." (2925A).
(3) CC did not have the financing to carry on the contest (Def. Br. p. 23).	This contention was rejected by the majority opinion of this Court (480 F.2d at 375); CC's financial statements, introduced at the damage trial, show conclusively that CC had over $14 million in cash to use for purchases, with an additional $10 million in borrowing capacity on top of that (EV 1111-14, 3086-88A, 3094-95A, 3105A).

Defendants' Brief	*The Record*
(4) CC was "restricted under its senior indebtedness from purchasing for cash any further Piper shares after February 1969" (Def. Br. p. 24).	Another false issue. The restrictions would disappear if CC got 50% of Piper (3090A). And if waivers were needed, Gordon was assured they were available (3090A). Indeed, an official of IDS, CC's principal lender, testified that waivers would be forthcoming since "we obviously didn't want the company [CC] to be owning a small percentage of Piper that they could not control the board" (1082A). Potts testified that lenders would come forward even if IDS did not agree to waive the default (3113A).
(5) Even if CC had enjoyed a 41% to 31% lead, BP would have pressed forward with a "determined and well-financed campaign" for control (Def. Br. pp. 12, 24, 41).	BP's own documents, which defendants ignore, reveal that it was unwilling to commit cash to the contest unless it was sure of obtaining control (EV 300, 1832A). Moreover, Wallace testified that when the contest stood at 33% to 31% in favor of CC, he warned the Piper family it was almost too late for BP to come in (3191A, 3194A). Finally, Wallace, who testified after Wahrsager at the damage trial, had a full opportunity to challenge Wahrsager's opinion that BP would not have wasted its money contesting a 41% to 31% lead (2481A), but did not do so.
(6) The normal attributes of control had little or no identifiable value to CC (Def. Br. p. 10).	The experts on both sides agreed that control of Piper has value and commands a premium (2433A, 2570A, 2842A). The testimony which defendants cite merely established that the experts did not believe it necessary, in determining that premium, to inquire what CC or BP subjectively intended to do with control. Gant testified, "I have not made any analysis [of BP's motive]. I have not discussed it with Bangor" (2344A).

Defendants' Brief	*The Record*
(7) "All the experts agreed with the Court below that the price paid by CCI and BPC for their Piper shares in the heat of battle had no relationship to fair market value" (Def. Br. p. 32).	To the contrary, CC's experts testified that the prices paid were relevant in determining the value of CC's plurality, as opposed to the value of 100 shares absent a control contest (*e.g.*, 2432A). More importantly, Wallace denied his company was acting irrationally (2967-69A) and Gant never asked why his client, BP, was making, and First Boston was recommending, payments of $80 a share for control (2844A).
(8) Wahrsager "could not offer a single instance" of a 40% premium for control being paid by a third party (Def. Br. p. 11, n.).	Wahrsager's report lists representative contests for control in which rival bidders paid premiums of 40% or better—and often in excess of 100% over market (EV 867-69). As the District Court held, CC was not obliged to come forward with an actual third party purchaser (2362A, n. 16). Indeed, Gant and Wahrsager agreed that BP itself would be the most likely one to buy CC's plurality at a premium—if BP were really determined to have control (2489A, 2875-76A).
(9) Murray and Rosenkrantz testified that "no premium reflecting the 'opportunity to gain control' was warranted" (Def. Br. p. 26).	Murray testified that the fair market value of CC's plurality block was $57 and that a buyer interested in control "undoubtedly would have been willing to pay a premium" up to 40% for CC's block (2569-70A). Rosenkranz testified that CC's plurality block would have a value well in excess of his 100-share figure of $58 (2630A), but it was not his assignment to quantify the premium (2627A). That assignment was left to Wahrsager.
(10) CC's experts agree that in determining the appraisal value of Piper shares, the value of 100 shares is the correct criterion (Def. Br. p. 10).	The value of 100 shares is the correct criterion only to determine the value of 100 shares. CC's experts stressed that it was only the *starting point* in determining the value of CC's plurality and minority blocks (EV 834, 885, 924).

(11) Throughout their brief, defendants equate, and use interchangeably, market value and intrinsic value (*e.g.*, Def. Br. pp. 15, 34).

Fitzgerald, Murray and Wahrsager all stressed that the two are distinct concepts which cannot be used synonymously (3367A, 2459A; EV 877-79).

(12) Murray and CC's other experts "accepted Fitzgerald's economic conclusions and analysis" (Def. Br. p. 15, n. and p. 16).

Use of the same stardard tools of analysis as Fitzgerlad does not mean his approach is correct, as Murray pointed out (EV 879).

(13) Murray's "conglomerate value" of $57 for Piper was unfounded (Def. Br. p. 16).

Murray's $57 value, like Rosenkrantz' $58 market value, was simply an update of Fitzgerald's $55 market value for Piper as of May 7, 1969 (EV 879).

(14) "[I]f the outstanding injunction against any merger between BPC and Piper were dissolved and BPC announced an intent to merge with Piper, the 'conglomerate value' of CCI's Piper shares would immediately be restored" (Def. Br. p. 18).

This distorts Murray's simple point: the price of Piper shares fell once BP got majority control and announced that it was not then prepared to acquire the remaining shares at the prevailing price (2592A). The only way that conglomerate value could be restored would be if BP were willing to pay it—which it was clearly not willing to do.

(15) Wahrsager testified that he discounted his January 1970 offering price by 10% because of the necessity of disclosing the serious Twin Commanche retrofit issue but that "the 'serious issue' did not in fact exist" (Def. Br. p. 14, n.).

Wallace testified that the Twin Commanche liability was so material that it would have to be disclosed to any buyer of Piper stock (1899A), and thus confirmed Wahrsager's observation that at the time of his hypothetical public offering, when a prudent underwriter performs his due diligence examination, Piper's Board was very concerned with the magnitude of the problem (2485-87A).

(16) Rosenkranz testified that CC's minority position "could have been sold privately" and his valuation was "completely arbitrary" (Def. Br. p. 20).

Rosenkranz did not so testify. He performed an evaluation of CC's block "as if it were a block of marketable securities" and applied accepted discounts for blockage and illiquidity which were determined by reviewing letter stock transactions and other comparable cases (2634-36A; EV 924-26, EV 978-79).

Defendants' Brief	*The Record*
(17) Rosenkranz's appraisal valuation method was a "purposeful deception" (Def. Br. p. 20).	Rosenkranz did not misrepresent his methodology, which was to compute a price that "somebody stepping into Chris-Craft's shoes" would be willing to pay in light of the risk of a merger and statutory appraisal sometime in the future (2636-41A; EV 927-31). Murray did the same (2522-25A).
(18) Murray is "not an investment banker but a college professor" (Def. Br. p. 15).	The S. Sloan Colt Professor of Banking and Finance at the Columbia Business School, Murray's credentials were termed "magnificent" by the District Court (2505A). He has managed billion dollar portfolios (2502A) and was the only expert with practical business contacts with the Pipers, Beeches and others in the light aircraft industry (2559-60A, 2568A, 2578A).
(19) The public company headed by Ross is a "long-time client of CCI's counsel" (Def. Br. p. 21).	So what? Gant is an officer of a major client of First Boston's counsel (2861A).

II. Defendants' Addendum

Defendants' Addendum is as inaccurate as the paraphrases of the record in the body of their brief. Each item on defendants' addendum is incorrect, as the following responses show. The numbering corresponds to that in defendants' addendum.

1. Not only Arthur Long, the experienced proxy contest expert retained by BP, but Wallace and Nicolas Bayard of First Boston also believed the large blocks were committed to CC (382A-1, 1826A, 1836A).

2. See No. 4, *supra*, at p. A-2.

3. See No. 3, *supra*, at p. A-1.

4. The prior opinion of this Court specifically rejected this argument by BP that CC was obliged to show it would have gained the shares BP illegally acquired.

5. This Court held CC had no duty to mitigate its loss by dropping out of the contest (480 F.2d at 376). Gordon testified that CC persisted in the contest because it hoped to overturn BP's unlawful acquisitions in Court (Tr. 693).

6. See No. 1, *supra,* at p. A-1.

7. The fact that the economy deteriorated after BP embarked on its plan to squeeze CC does not justify BP's conduct but merely increases the damage to CC's locked-in position.

8. BP's excuse does not alter the fact that when BP needed a majority of the Board it could and did, over CC's objection, change the size of the Board to an odd number (CC Br. p. 10, n.).

9. BP's own prospectus on its exchange offer stated that if BP got 51% of Piper's stock, BP would acquire the power to merge (EV 31). And Wallace so testified (1883A).

10. Gant's public offering price was based on the fictitious assumptions that CC could obtain audited financials and register its stock instantaneously on September 5, and that BP would cooperate in such a registration. Gant's $31 to $34 estimate of what the block could actually have sold for on September 5 assumed that BP would agree to register the Piper stock at a later date. See p. 15, n., *supra.*

11. BP's response is a *non sequitur.* The sentence in CC's brief refers to Gant's admission that CC would have great leverage against BP if CC were leading in a fair contest for control.

12. See p. 13, *supra.*

13. As p. 17, n.** of CC's main brief shows, CC requested BP to permit CC to accept BP's exchange offer and give CC an underwriting so that it could liquidate its block. BP refused (1504-05A).

14. Piper's earnings' short fall in 1973 was not due to decreased sales—which occurred in 1972 as a result of the flood—but to uncontrolled costs unrelated to the flood (EV 90). Murray's report points out that he did not agree with the Piper projections Fitzgerald used (EV 873).

Service of three (3) copies of the within brief is hereby admitted this 14th day of February, 1975.

Webster Sheffield Fleischmann Hitchcock & Brookfield

WEBSTER SHEFFIELD FLEISHMANN HITCHCOCK & BROOKFIELD
Attorneys for Bangor Punta Corporation,
David W. Wallace and Nichols M. Salgo

Sullivan & Cromwell

SULLIVAN & CROMWELL
Attorneys for The First Boston Corporation

Chadbourne, Parke, Whiteside & Wolff

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Piper Aircraft Corporation, Howard Piper,
Thomas F. Piper and William T. Piper, Jr.

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(3913)